No. 96-1004

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM J. SHEPPARD,
Petitioner,

vs.

ENRIQUE J. DIAZ,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Brief In Opposition without prepayment of costs and to proceed in forma pauperis:

Respondent has previously been granted leave to proceed in forma pauperis in the following courts:

United States District Court, Middle and Southern Districts of Florida; United States Circuit Court of Appeals For The Eleventh Circuit; Second Judicial Circuit In And For Leon County, Florida; District Court of Appeal of Florida, First District; Eleventh Judicial Circuit In And For Dade County, Florida; District Court of Appeal of Florida, Third District; and Supreme Court of Florida.

Respondents' affidavit in support of this motion is attached hereto.

19 pp

RESPONDENT'S AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Enrique J. Diaz, am the respondent in the above-entitled case. In support of my motion to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of this case or give security therefor; and I believe that I am entitle to redress.

I further swear that the responses set forth infra relating to my ability to pay the costs of proceeding in this Court are true.

1. Are you presently employed? Yes____ No X

My last employment was in 1977 and my wages per month were approximately $500.00.

2. During the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources except gifts that I have received from my family that have not exceeded $ 200.00

3. I have no funds in my Inmate Bank Account. In fact I have a hold exceeding $ 50.00.

4. I do not own any property.

I declare under penalty of perjury that the foregoing is true and correct
Executed on: February 24, 1997.

/s/ Enrique Diaz
Enrique J. Diaz, affiant

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IN THE
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WILLIAM J. SHEPPARD,
Petitioner,

vs.

ENRIQUE J. DIAZ,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Enrique J. Diaz, pro se
Florida State Prison
P. O. Box 181
Starke, FL 32091
(904) 964-8125

QUESTIONS PRESENTED

The questions presented in the petition are: [restated]

1. Following final judgment in a section 1983 lawsuit certified under Rule 23 (b) (2), Federal Rules of Civil Procedure, may class counsel remove from state court a common law complaint alleging legal malpractice, negligence and breach of contract by a class member?

2. Following final judgment in a section 1983 lawsuit certified under Rule 23 (b) (2), Federal Rules of Civil Procedure, is class counsel immune from lawsuit for legal malpractice, negligence and breach of contract?

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APPENDIX 1

Complaint Filed June 24, 1994 In The Circuit Court of The Fourth Judicial Circuit, In And For Duval County, Florida

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case as set forth by the petitioner in his petition except that respondent negates that his claim is predicated on a guarantee of one (1) hour a day of outdoor exercise. See Complaint at COUNT I attached hereto Respondent's Appendix at 1.

REASONS FOR DENYING THE PETITION

The district court held that any and all class action attorneys are totally immune from suit for legal malpractice:

> "The general duty owed by class counsel to the class as a whole is insufficient, as a matter of law, to support an action by individual class members for alleged legal malpractice."

Petitioner's Appendix at 33a. However, the Circuit Court did not rule on the propriety of this holding. The Circuit Court's decision did not reach that issue because it found that no federal jurisdiction existed. Accordingly the issue of whether the petitioner, as class counsel, is immune from suit is not properly before this Court and the petitioner's bootstrapping it to the issue of jurisdiction should not be permitted.

As to the issue of federal jurisdiction the respondent asserts that the decision below properly applied the rulings in,. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); and, Gully v. First National Bank, 299 U.S. 109 (1936). The peti-

tioner has misrepresented respondent's claim in an effort to create conflict between the decision below and this Court's decisions cited above. On page 13, for example, petitioner states:

> "However, as set forth in the respondent's complaint, his asserted Eighth Amendment right to one hour of daily out of cell exercise is an essential element of his professional liability claims. Diaz, 85 F.3d at 1504. Diaz must affirmatively prove his alleged legal entitlement under the Eighth Amendment in order to be able to establish an essential element of his claims.

[Emphasis added]. The petitioner is saying that respondent's claim turns entirely on his ability to prove that the Eighth Amendment guarantees him at least one hour per day of out of cell exercise. This is False! Petitioner is setting up a straw man. Respondent's claim of malpractice is predicated on the fact that the maximum of 2 hours per week of exercise and sometimes no exercise for years is far below the constitutional minimum. The fight is not over one hour per day of exercise but rather over 2 hours per week maximum. Respondent argues that no competent attorney would settle for 2 hours per week, that no court in the nation has ever held 2 hours per week of exercise to be constitutionally acceptable and that the petitioner committed legal malpractice when he settled the lawsuit, over respondent's objection, and against the recommendation of the district court's appointed experts (for one hour per day) for a mere two (2) hours per week. Petitioner is misleading this Court by mischaracterizing respondent's claim.

Under the true facts of this case federal jurisdiction does not exist and the petition should be denied.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied.

Date: February 24, 1997

Respectfully submitted,
s/ Enrique Diaz

Enrique J. Diaz 065599
Florida State Prison
P.O. Box 181
Starke FL 32091

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ENRIQUE J. DIAZ; and,
WAYNE L. JOHNSON,
Plaintiffs,

vs.

WILLIAM J. SHEPPARD,
Defendant.

Case No. 94-3040 CA
Division CV-F

COMPLAINT

1. This is a civil action complaint alleging legal malpractice, negligence and breach of contract on the part of the defendant, William J. Sheppard, attorney at law. Plaintiffs seek monetary damages and a trial by jury on each count and allegation herein.

JURISDICTION

2. This Court's jurisdiction is invoked pursuant to Rule 1.010, Florida Rules of Civil Procedure, and any other applicable rules or statutes.

VENUE

3. Plaintiffs choose venue in this Court pursuant to Rule 1.060, Florida Rules of Civil Procedure; venue properly lies in this Court inasmuch as the defendant's actions occurred and defendant resides in Duval County, Florida.

PARTIES

4. Plaintiffs, Enrique J. Diaz, #065599 and Wayne L.

APPENDIX 1

Johnson, # 069301, are state prisoners as defined by 944.02(s), Florida Statutes, and are confined at: Florida State Prison, P.O. Box 747, Starke, FL., 32091. Plaintiffs are proceeding pro se.

5. Defendant, William Sheppard, is an attorney whose business address is: Sheppard & White, P.A., 215 Washington Street, Jacksonville, FL., 32202.

STATEMENT OF FACTS

6. In 1972 two federal lawsuits were commenced by two Department of Corrections (D.O.C.) inmates in the United States District Court, Middle District of Florida, Jacksonville Division. These cases were styled Celestineo v. Wainwright, 72-109-Civ-J-14, and Costello v. Wainwright, 72-94-Civ-J-14.

7. Subsequently the cases were offered to the defendant who accepted the cases and became counsel; the cases were consolidated and certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. The class was certified to consist of all present and future D.O.C. inmates. Defendant became class counsel and remained class counsel until the closing of the case on or about February, 1993. Through attrition this consolidated case became and closed as Celestineo/Costello v. Singletary, et al, #72-109-Civ-J-14; 72-94-Civ.-J-14 (hereinafter Costello).

8. The Costello case concerned the constitutionality of the D.O.C.'s system for the delivery of physical and mental health care to inmates within its custody and care.

9. In June 1978, Diaz was sentenced to prison and thus automatically became a class member of Costello and a client of defendant; subsequent to an escape in 1983 Diaz was resentenced to multiple life terms and has been a class member since.

10. In 1979, Johnson was sentenced to prison and thus automatically became a class member of Costello and a client of defendent, After release in 1980 Johnson was again sentenced to prison; he received Sixty (60) years in 1981 and has been a class member since.

11. Diaz has spent over six (6) years and Johnson over one (1) year on close management; close management (CM.) is defined in Chapter 33-3.0083 (1), Florida Administrative Code (F.A.C.):

> (1) Close management is long-term single cell confinement of an inmate apart from the general population...

12. CM inmate are confined in small 6 feet by 9 feet cell 24 hours a day; they receive a maximum two hour per week of outdoor exercise in one two hour session.

13. CM. inmates, including plaintiffs, were often, for months at a time, denied any and all outdoor exercise (yard) by Placement on the Yard Suspension List (YSL).

14. On or about February 1984, the Costello Court ordered a committee of doctors and experts to review the Situation regarding health care within the D.O.C. On or about March 6th 1985 the committee filed a document called the "Interim Medical Team Report" in the Costello case.

15. This Report specifically recommended that Segregated inmates (e.g. CM inmates) be accorded at least one (1) hour Per week of large muscle exercise outside of their Cell.

16. On or about June 25, 1985 the D.O.C. Changed rule 33-3.0083 (9) (j) F.A.C. from four (4) hour per week of yard to two (2)

hours per week of yard for C.M. inmates while defendant stood passively by armed with the Report recommending that C.M. inmates be accorded one (1) hour per day of large muscle exercise outside of their cells.

17. By June 25, 1985, defendant was fully aware of the large body of case law, including one Fifth Circuit case prosecuted by defendant, which held that, 1) it is unconstitutional (a violation of the Eighth Amendment) for prison officials to deprive inmates in long term solitary confinement, such as C.M., of any and all yard; and, 2) the constitutionally mandated minimum of one (1) hour per day of yard for all long term solitary confinement inmates.

18. Because the Costello case was still pending plaintiffs believed that defendant sheppard would ultimately obtain at least one (1) hour of yard for them through trial or consent decree.

19. On or about October 9, 1992, the Costello Court issued a "Notice of Proposed Stipulated Final Judgment and Closing of this Case" (N.P.F.J.). Paragraph 2 (page 3) of the N.P.F.J. states that:

> "The Florida Department of Corrections with the oversight of the Florida Correctional Medical Authority ("Authority"), has a constitutionally adequate system for the delivery of physical and mental health care to inmates within the custody of the Department of Corrections."

Paragraph 3, meanwhile, states:

> "The actions of the defendant and the Authority provide assurance that they have and will continue to maintain a system for the delivery of physical and mental health care which incorporates the standards for health

care required by the agreements and relevant Orders of the Court."

20. Diaz and Johnson immediately wrote defendant sheppard practically begging him not to agree to such a proposed stipulated final judgment; plaintiffs pointed out that the above quoted paragraphs were unequivocally and emphatically False to the extent that they failed to note and correct the blatantly unconstitutional denial / restriction on outdoor yard for thousands of confinement inmates within the D.O.C., said denial / restriction often lasting for years and years; that the proposed stipulated final judgement simply ignored these conditions (in the process ignoring all existing case law and ignoring the Court's own appointed medical experts).

21. Diaz and Johnson explained that outdoor exercise is an integral component of good physical and mental health for confinement inmates and thus such denial / restriction of yard was a medical issue within the scope of Costello, a case for which defendant Sheppard had been paid over four million dollars ($4,000,000.00) in attorney fees.

22. Because defendant sheppard failed to protect the physical, mental and psychological health of thousands of members of the class by failing to demand that Florida meet the constitutionally mandated minimum of yard time, Diaz was forced to file his own Civil Rights Complaint pursuant to Title 42 U.S.C., §1983. This complaint was filed on December 28, 1992, and is currently pending/styled Diaz, et al, v. Singletary, Jr., et al., #92-1406-Civ-J-20 (M.D. Fla.).

23. As a result of the actions/inactions of defendant Sheppard, Florida, alone in the nation, still maintains a retrograded prison system that denies confinement inmates any and all yard for years at a time and only accords two hours per week of yard for those inmates who do get yard, to the physical and

mental detriment of the inmates.

24. Had defendant sheppard required compliance with the Report as part of the proposed stipulated final judgment in Costello, Diaz, Johnson and all other class members would be receiving the recommended and constitutionally mandated minimum of one hour of outdoor exercise daily as opposed to the deficient two hours per week they sometimes get.

25. It has been made clear by all courts which have addressed the issue of outdoor exercise for long term solitary confinement inmates across the nation for the past twenty five (25) years that yard is a constitutional right, not a privilege and that denial of yard violates the Eighth Amendment; a conclusion based upon the unrefuted and overwhelming weight of expert medical testimony.

26. Even in the most secure maximum security prison nationwide (Marion, Illinois) confinement inmates receive a minimum of one hour per day of yard. At the infamous Pelican Bay Prison ("super-max") in California even the most dangerous inmates get ninety (90) minutes per day of yard. Here in Florida the most dangerous of all inmates (Death Row) are accorded four (4) hours per week of yard due to defendant Sheppard who represented them in Dougan v. Singletary, # 81-11-Civ-J-10 (M.D. Fla.) while Diaz and Johnson are stuck with the deficient two hours which are perceived as a privilege by D.O.C. officials and often denied them.

27. As a result of defendant sheppard's actions/inactions plaintiffs suffered, and continue to suffer, a substantial loss/deterioration of weight, mental, emotional and physical health; plaintiffs suffer unexplainable and sudden mood shifts, nervousness, inability to sleep or concentrate, memory loss, mental lassitude, emotional distress, anguish, substantial loss of muscle

tone, strength, stamina and a deterioration of cardiovasculary and respiratory health.

28. Defendant Sheppard has, throughout the Costello litigation, deliberately kept Diaz and Johnson in the dark about what he has, and has not, done in the case, and as to Court orders, documents and the course of the litigation in general, thus denying Diaz and Johnson the ability to timely object to the course of action defendant sheppard was taking.

29. Defendant Sheppard had an obligation to represent and protect the legal rights and interests of Diaz and Johnson by ensuring that the D.O.C. provide them with adequate physical and mental health care, but instead sold out the entire class by signing the patently false stipulated Final judgment which closed Costello in or about February, 1993.

30. As a direct result of the actions/inactions of defendant in negligently and incompetently failing to require compliance with the Interim Medical Team Report (Report) recommendation as part of the October 1992 Proposed stipulated Final Judgment, plaintiffs have no yard rights, but instead yard "privileges" which fall far from short from the nationally accepted minimum of one hour per day and which can, and have been, taken away for indefinite periods of time.

31. Plaintiffs suffer emotional distress due to their knowledge that they will, for at least years to come, be denied their right to adequate exercise opportunities, and their knowledge that they may, at any time, lose all yard privileges by placement on the YSL, all due to the negligence, indifference and incompetence of their own well paid attorney, defendant Sheppard.

32. Defendant Sheppard was retained by, and employed by, the Costello class, including Diaz and Johnson. As a result of defendant Sheppard's acceptance of his employment as class

counsel a contractual relationship existed between defendant Sheppard and plaintiffs Diaz and Johnson, members of the class, and Sheppard had a duty to vigorously protect the legal rights and interests of the Costello class members, in accordance with Rule 23, Federal Rules of Civil Procedure and the Rules of Professional Conduct of the Rules Regulating the Florida Bar (RPC-TFB).

33. Plaintiffs submit that the injuries, damages and losses they've suffered, and continue to suffer, are a direct result of defendant Sheppard's negligence and his failure to perform the services which he agreed to perform (i.e., to vigorously protect the legal rights and interests of his clients, the Costello class members), and his failure to abide by the Rules of Professional Conduct of the Rules Regulating the Florida Bar, and that these failures by defendant Sheppard are, in fact, the proximate cause of Diaz and Johnson's injuries, damages and losses.

34. Plaintiffs submit that defendant Sheppard's conduct, actions, inactions and failures as set forth herein constitute great indifference and/or a callous, reckless disregard for plaintiff's known and well established rights and/or were the result of malice, ill will and/or spite so as to justify an award of punitive damages.

COUNT I
(First Cause of Action)

35. Plaintiffs adopt, incorporate and reallege all of the facts and allegations set forth in paragraphs #1 through #34, above Plaintiffs submit and allege that defendant Sheppard committed legal malpractice, as defined by law, due to his conduct, actions/inactions in failing to protect the legal rights and interests of his clients Diaz and Johnson, as class members of Costello. Defendant's conduct, action/inactions consisted of his negligent and/or deliberate refusal to include the recommended one hour per day of yard in the stipulated final judgment and/or agreeing to the proposed stipulated final judgment which in effect acquiesced to the measurably deficient two hours per week of yard for segregated class members which defendant Sheppard knew had an adverse impact upon the physical, mental and psychological health of the segregated class members and fell below the nationally accepted minimum of one hour a day which was universally established by numerous federal courts throughout the country and be ow the one hour per day recommended in the Interim Medical Team Report.

COUNT II
(Second Cause of Action)

36. Plaintiffs adopt, incorporate and reallege all of the facts and allegations set forth in paragraphs #1 through #35, above. Plaintiffs submit and allege that the defendant's conduct, actions/inactions as set forth herein constitute negligence as defined by law.

COUNT III
(Third Cause of Action)

37. Plaintiffs adopt, incorporate and reallege all of the facts

and allegations set forth in paragraphs # 1 through #36, above. Plaintiffs submit and allege that the defendant's conduct, actions / inactions as set forth herein constitute breach of contract as defined by law.

JURY TRIAL DEMAND

38. Plaintiffs demand a trial by jury on each and every count and allegation contained herein.

DAMAGES

39. Plaintiffs seek monetary damages as follows:

A) Compensatory damages in the amount of Fifty thousand dollars (# 50,000.00).

B) Punitive damages in the amount of one hundred thousand dollars (# 100,000.00).

Respectfully submitted,

/s/
Enrique J. Diāz 065599
P.O. Box 747
Starke, FL. 32091

/s/
Wayne L. Johnson 069301
P.O. Box 747
Starke, FL. 32091

NOTARY PUBLIC CERTIFICATE

STATE OF FLORIDA
COUNTY OF BRADFORD SS.

Before me, the undersigned notary public, personally

appeared Enrique J. Diaz, #065599 and Wayne L. Johnson, #069301, who while by me being first duly sworn under oath and penalty of perjury, depose and say that all of the foregoing facts in this complaint are true and correct and based on their personal knowledge, this day of June, 1994.

/s/
Notary Public, State of Florida

My Commission Expires: _____